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Public Prosecutor v Nasir bin Insiban

HIGH COURT (KOTA KINABALU) — CRIMINAL REVISION NO K43-01 OF 1995
TEE AH SING JC
B 9 FEBRUARY 1996

Criminal Procedure *— Acquittal or discharge — Discharge of accused amounting to acquittal — Witnesses not available — Request for further adjournment denied — Whether magistrate can acquit and discharge the accused without hearing all the evidence for the prosecution — Criminal Procedure Code (FMS Cap 6) ss 173(c), (f), 254*
C

The accused was charged with an offence under s 489C of the Penal Code. On 27 March 1995 the trial commenced and the prosecution called three witnesses. The prosecution then applied for an adjournment as two of its witnesses were unavailable.The matter was
D adjourned to 19 April 1995. Due to the continued unavailability of the prosecution's witnesses, the matter was adjourned several times on the prosecution's request to 26 and 27 July 1995. On 27 July 1995, the prosecution requested for yet another adjourment as two of its witnesses were still unavailable. Counsel for the prosecution
E submitted that if the adjournment was not granted, he would apply for an order of discharge not amounting to an acquittal against the accused. Counsel for the accused submitted that if the adjournment was not granted, the court should acquit and discharge the accused based on the evidence before the court. The learned magistrate refused to grant the adjournment and proceeded to discharge and
F acquit the accused. The issue before the court was whether a magistrate holding a summary trial could acquit and discharge the accused without hearing the evidence for the prosecution.

Held, setting aside the order of acquittal and discharge of the accused
G and substituting it with an order of discharge not amounting to an acquittal:

(1) The phrase 'all such evidence as may be produced' in s 173(c) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') has the same meaning as the phrase 'all the evidence hereinbefore referred to' in s 173(f) of the CPC. The evidence meant by these two
H phrases include both the evidence which is available at the trial and that which is not but will be made available if a postponement of the trial is granted (see p 158F); *PP v Zainuddin* [1986] 1 MLJ 100 followed.

(2) In a summary trial, paras (c) and (f) of s 173 of the CPC do not
I empower the court to order a discharge amounting to an acquittal of an accused person without hearing evidence of the prosecution in support of its case (see p 158G); *PP v Zainuddin* [1986] 1 MLJ 100 followed.

[**Bahasa Malaysia summary**

Tertuduh telah dituduh dengan kesalahan di bawah s 498C Kanun Keseksaan. Pada 27 Mac 1995 perbicaraan telah bermula dan pihak pendakwaan telah memanggil tiga orang saksi. Pihak pendakwaan kemudiannya memohon suatu penangguhan kerana dua orang saksinya tidak dapat hadir. Perkara itu telah ditangguh kepada 19 April 1995. Oleh kerana saksi-saksi pihak pendakwaan terus tidak dapat menghadirkan diri, perkara itu telah ditangguhkan beberapa kali atas permintaan pihak pendakwaan sehingga 26 dan 27 Julai 1995. Pada 27 Julai 1995, pihak pendakwaan telah sekali lagi memohon untuk penangguhan kerana dua orang saksinya masih lagi tidak dapat hadir. Peguam untuk pihak pendakwaan telah berhujah bahawa jika penangguhan itu tidak diberi, beliau akan memohon untuk perintah pelepasan yang tidak merupakan pembebasan terhadap tertuduh. Peguam untuk tertuduh berhujah bahawa jika penangguhan tidak diberi, mahkamah patut membebaskan dan melepaskan tertuduh berdasarkan keterangan di hadapan mahkamah. Majistret yang bijaksana telah enggan memberi penangguhan itu dan telah meneruskan untuk melepaskan dan membebaskan tertuduh. Isu di hadapan mahkamah adalah sama ada seorang majistret yang menjalankan perbicaraan terus boleh membebaskan dan melepaskan tertuduh tanpa mendengar keterangan untuk pihak pendakwaan.

Diputuskan, mengetepikan perintah pembebasan dan pelepasan terhadap tertuduh dan menggantikannya dengan perintah pelepasan yang merupakan pembebasan:

(1) Ungkapan 'kesemua keterangan sepertimana yang mungkin dikemukakan' dalam s 173(c) Kanun Acara Jenayah (NMB Bab 6)('KAJ') mempunyai makna yang sama dengan ungkapan 'kesemua keterangan yang dirujuk kepada sebelum ini di sini' dalam s 173(f) KAJ. Keterangan yang dimaksudkan oleh dua ungkapan ini termasuklah kedua-duanya keterangan yang sedia ada di perbicaraan serta keterangan yang tiada di perbicaraan tetapi akan dibuatkan sedia ada jika penangguhan perbicaraan diberi (lihat ms 158F); *PP v Zainuddin* [1986] 1 MLJ 100 diikut.

(2) Dalam suatu perbicaraan terus, perenggan-perenggan (a) dan (c) s 173 KAJ tidak memberi kuasa kepada mahkamah untuk memerintahkan suatu pelepasan yang merupakan pembebasan seorang yang tertuduh tanpa mendengar keterangan pihak pendakwaan yang menyokong kesnya (lihat ms 158G); *PP v Zainuddin* [1986] 1 MLJ 100 diikut.]

Notes

For cases on the discharge of the accused without hearing the prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 61, 68–69.

A **Cases referred to**

PP v Zainuddin & Anor [1986] 2 MLJ 100

Legislation referred to

Criminal Procedure Code ss 173(c),(f), 254

B

Amir Nasruddin (Deputy Public Prosecutor) for the Public Prosecutor.
Sugumar Balakrishnan (*Sugumar & Co*) for the accused.

Cur Adv Vult

C **Tee Ah Sing JC**: In this case the accused was charged as follows:

> That you, on 10 October 1989, at about 12.30 noon, at the car park, 4th Floor, Wisma Merdeka, in the District of Kota Kinabalu, in the State of Sabah, had in your possession forged currency note, to wit, 1,922 pieces of Malaysian One Hundred Ringgit, knowing or having reason to believe the
> D same to be forged, and intending to use the same as genuine, or that it may be used as genuine, and that you have thereby committed an offence punishable under s 489C of the Penal Code (FMS Cap 45) of the Laws of Malaysia.

Prior to 27 March 1995 there were five previous postponements applied
E by the prosecution. On 27 March 1995 the prosecution commenced its case.

DPC Charles Albert Savarimuthu (PW1) gave evidence. He stated that on 10 October 1989 he was a member of the raiding party led by Insp Hamzah that lay an ambush at 4th Floor Wisma Merdeka car park. In that
F operation six persons were arrested. One of them was the accused.

The second witness Sgt Azlan Chua @ Chua Ah Hing also testified that he was one of the members of the raiding party led by Insp Hamzah. In the operation he saw a van No SA 6614H. At about 12.30pm he arrested one Amajid bin Jaud who was sitting in the driver seat when the van was stationary.

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The third witness PC Chan Michael also testified he took part in the ambush led by Insp Hamzah. His role in the ambush was to keep out for van No SA 6614H. At about 12.30pm he arrested one Amajud who was sitting in the van. No incriminating items were found in the van.

The prosecuting officer then requested for a postponement as he had
H one witness from Kuala Lumpur and one witness in Johor Baharu. So it was adjourned to 19 April 1995.

On 19 April 1995 the prosecution requested for another adjournment on the grounds that two witnesses, namely, Chief Insp Hamzah Darus was in Kedah and Insp Loi was in Johor Baharu. Both were deployed for
I election duty. So the trial was adjourned to 10 June 1995.

On 10 June 1995 the case was adjourned at the request of the prosecution. The next date for continuation of hearing was fixed on 26 July 1995 and 27 July 1995.

On 27 July 1995 the prosecution requested for another postponement on the grounds that the prosecution had two more witnesses left. They were not present in court. The prosecuting officer submitted that if the court refused to grant the adjournment then he would apply for the case against the accused to be discharged not amounting to an acquittal. The learned counsel for the accused submitted that if the postponement was not granted, he urged the court to grant a discharge and acquit the accused based on the evidence before the court. The prosecuting officer replied that the prosecution had not yet closed its case and that therefore an acquittal would be out of the question.

The learned magistrate refused to grant the request for postponement. In p 20 of the record of proceedings the learned magistrate said:

> Having gone through the available evidence I found that the prosecution has not made out any case against the accused. I therefore order that the accused is discharged and acquitted from the charge.

The learned deputy public prosecutor submitted that it was wrong for the learned magistrate to order the acquittal and discharge. The learned counsel for the accused conceded that in the light of the Supreme Court decision of *PP v Zainuddin & Anor* [1986] 2 MLJ 100 the learned magistrate was wrong in making an order of acquittal.

In *PP v Zainuddin & Anor* [1986] 2 MLJ 100 his Lordship Salleh Abas LP (delivering the judgment of the court) at pp 101 and 102 said:

> The question which we have to answer here was whether a magistrate holding a summary trial could acquit and discharge the accused without hearing the evidence for the prosecution at all.
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> Until the decision of Mohamed Azmi J (as he then was) in *PP v Mohamed Said* [1984] 1 MLJ 50 it was generally considered as settled law that the magistrate had no such powers. Murray-Aynsley J in *Kuppusamy v PP* [1948] MLJ 25 held that the earliest stage at which a magistrate can acquit an accused person is after hearing all the evidence for the prosecution. This ruling was accepted and followed by Ong Hock Sim J in *PP v Goh Kee Chuan* [1967] 1 MLJ 174 and *PP v Mahmud* [1974] 1 MLJ 85. This view was also accepted by the Federal Court, whose judgment was delivered by Ong CJ in *Chu Chee Peng v PP* [1973] 2 MLJ 35.
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> In *Chu Chee Peng*'s case the court was clearly of the view that a magistrate could not order an acquittal of the accused without hearing all the evidence which could be material to the prosecution case and that any discharge ordered by the magistrate without hearing such evidence could not amount to an acquittal and therefore could not be set up as a defence of autrefois acquit should the accused be subsequently re-charged for the same offence. The court in no uncertain terms said that there were two circumstances in which a magistrate could order an acquittal—
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> (1) when after all the evidence has been heard no case has been made out to support the charge, the acquittal is mandatory at the end of the prosecution (s 173(f));
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> (2) when because the main prop of the prosecution case has prematurely collapsed, and further proceeding would be an exercise in futility, the prosecution may in its discretion offer no further evidence (s 254).

Any discharge of the accused other than in these two circumstances, such as a discharge because the charge is considered to be groundless, or because the application for postponement by the prosecution was turned down and the prosecution was unable to proceed, should only be a discharge not amounting to an acquittal.

However, this clear ruling was not followed by Mohamed Azmi J (as he then was) in *PP v Mohamed Said* [1984] 1 MLJ 50. The facts in that case were almost similar to those in the case under the present reference. In that case, because of the number of postponements and the inability of the prosecution to proceed due to the unavailability of two material witnesses, the accused was discharged twice by the magistrate. The first discharge was ordered after the trial had commenced and the evidence of six witnesses was heard, whilst the second discharge, which was stated to be amounting to an acquittal, was ordered before any evidence was heard at all. The second discharge was the result of the magistrate's refusal to allow the prosecution's application to postpone the trial. In other words, because of the inability of the prosecution to proceed with the trial, the magistrate ordered the accused to be acquitted.

The prosecution conceded in *Mohamed Said*'s case that the decision of the magistrate refusing the postponement asked for was a correct one but disputed that the magistrate had the power to order a discharge amounting to an acquittal.

Mohamed Azmi J disagreed with the prosecution's submission and upheld the ruling by the learned magistrate. In doing so he seemed to be preoccupied by a fear that if it were held that the magistrate was incapable of ordering an acquittal following his refusal to allow a postponement, the prosecution would have been able to continue charging the accused for the third time or indeed as many number of times as there would be discharges. He saw the situation as a judicial prosecution confrontation—a deadlock which should be avoided and solved. As a measure to thwart the prosecution's 'abuse of power' of repetitive re-charging, he thought that the magistrate should have the power to deny the prosecution the right to re-charge the accused. He thus based his ratio upon a narrow construction of para (c) of s 173 of the Criminal Procedure Code ('the CPC'). This paragraph says:

> 'If the accused refuses to plead or does not plead or claims to be tried, the court shall proceed to hear the complainant (if any) and to take "*all such evidence as may be produced in support of the prosecution case.*" (Emphasis is ours.)

He construed the emphasized phrase to mean only 'all such *available* evidence as may be produced in support of the prosecution *at the trial*' (again the emphasis is ours), thereby excluding the evidence which is not so available, even though such evidence is material and needed by the prosecution to support its case and as such a postponement is sought for in order to make it available. The result is, according to the learned judge's ruling that where material evidence (evidence in support of the prosecution) is not available at the trial the court may, by refusing adjournment, treat the case of the prosecution as at an end and acquit the accused under para (f) of s 173 of the CPC.

We do not accept this narrow construction as it is plainly contrary to the wording of para (f) which is as follows:

> 'If, upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if

> unrebutted would warrant his conviction the court shall record an order of acquittal.'
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> Under this paragraph an order of acquittal can be recorded only (1) when 'all the evidence hereinbefore referred to' has been taken and (2) when the court finds no case against the accused 'has been made out which if unrebutted would warrant his conviction ...'.
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> When does the court make a finding as to whether a case against the accused is made out or not? Surely, at the close of the prosecution case. And what is the basis on which such a finding is made? The answer must be that the finding is made on the basis of 'all the evidence hereinbefore referred to.' Now what does this phrase mean? Whilst we accept the view of Mohamed Azmi J in that whatever this phrase means it must bear the same meaning as does the phrase 'all such evidence as may be produced in support of the prosecution case' appearing in para (c), we do not however agree that these two phrases only mean 'such evidence as is available at the trial.' In our view, these phrases also include evidence not available on the date of the trial as long as such evidence is material and needed to support the prosecution case.
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> Yet, if we accept the narrow construction in *Mohamed Said*'s case the court can acquit the accused at any stage irrespective of whether it has heard some evidence or none at all. Both cases—partly heard and not yet heard cases—are in the same position in that they run the risk of being frustrated by the court refusing an adjournment, necessitating the making of an order of acquittal if the evidence needed to support the prosecution case is not available on the day of the trial. This is plainly contrary to the decision in *Kuppusamy*'s case.
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> In our view the court has no such power before the end of the prosecution case, whether the evidence has been given or not. The phrase 'all such evidence as may be produced' appearing in para (c) of s 173 of the CPC of course has the same meaning as the phrase 'all the evidence hereinbefore referred to' appearing in para (f). But the evidence meant by these two phrases include both the evidence which is available at the trial and that which is not but will be made available if a postponement of the trial is granted.

And at p 103 his Lordship said:

> In view of what we have said above, our answer to the question raised in this reference is that in a summary trial, paras (c) and (f) of s 173 of the CPC do not empower the court to order a discharge amounting to an acquittal of an accused person without hearing evidence of the prosecution in support of its case.

In view of the case of *PP v Zainuddin & Anor* [1986] 1 MLJ 100 the learned magistrate erred in law in ordering an acquittal and discharge of the accused. I hereby set aside the order of acquittal and discharge and substitute it with an order of discharge not amounting to an acquittal.

Acquittal and discharge set aside and substituted with a discharge not amounting to an acquittal.

Reported by Kenneth Goh